In the

United States

Court of Appeals

For the Ninth Circuit

CHARLES LAMBERT, *Appellant*,

v.

MERLE E. SCHNECKLOTH, Superintendent of Washington State Penitentiary, at Walla Walla, Washington, *Appellee.*

No. 15364

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

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APPELLEE'S STATEMENT OF THE CASE

This individual pleaded guilty to the crime of robbery on October 18, 1950, and was sentenced to twenty years confinement in the Washington State Penitentiary. While in prison, he was charged with first degree murder of a fellow inmate. On arraignment he entered a not guilty plea and two attorneys were appointed for him. Subsequently, he pleaded

guilty to first degree assault and was sentenced to fifty years confinement. This judgment was entered on June 22, 1955. It is this latter judgment and sentence which was attacked in the lower court and which the trial court summarily denied without requiring a return and answer from the appellee. We believe that the action of the trial court was correct. However, if a return and answer had been required, the appellee would have been able to have supplied a record to show that the issues which the appellant now complains of which were not heard by the trial court had been previously heard by a trial court of the State of Washington. The trial court of the State of Washington heard testimony from this appellant, from the prosecuting attorney, and from the attorney of the appellant, and made findings of fact and conclusions of law that no constitutional rights of this appellant have been violated.

APPELLEE'S STATEMENT OF THE QUESTION INVOLVED

Did the lower court properly deny the petition for a writ of habeas corpus, which attacked the consecutive sentence which had not yet begun to run, without contesting the validity of the judgment and sentence pursuant to which he is presently incarcerated.

ARGUMENT

It is respectfully contended by the appellee that the case of *McNally v. Hill*, 293 U. S. 131, 79 L. ed. 238, 243-244, conclusively substantiates the lower court's action in dismissing the application for a writ as being premature. The following quotes from the opinion and footnote will demonstrate the precedent which has guided the United States Supreme Court and the courts of appeal in such like matters:

> "Considerations which have led this Court to hold that *habeas corpus* may not be used as a writ of error to correct an erroneous judgment of conviction of crime, but may be resorted to only where the judgment is void because the court was without jurisdiction to render it, *Ex parte Watkins, supra* (3 Pet. 203, 7 L. ed. 653); *Knewel v. Egan*, 268 U. S. 442, 445, 447, 69 L. ed. 1036, 1039, 1040, 45 S. Ct. 522, lead to the like conclusion where the prisoner is lawfully detained under a sentence which is invalid in part. *Habeas corpus* may not be used to modify or revise the judgment of conviction. *Harlan v. McGourin*, 218 U. S. 442, 54 L. ed. 1101, 31 S. Ct. 44, 21 Ann. Cas. 849; *United States v. Pridgeon*, 153 U. S. 48, 63, 38 L. ed. 631, 637, 14 S. Ct. 746. Even when void, its operation may be stayed by *habeas corpus* only through the exercise of the authority of the court to remove the prisoner from custody. That authority cannot be exercised where the custody is lawful.
>
> "Wherever the issue has been presented, this Court has consistently refused to review,

upon *habeas corpus*, questions which do not concern the lawfulness of the detention. *Re Graham*, 138 U. S. 462, 34 L. ed. 1051, 11 S. Ct. 363; *Re Swan*, 150 U. S. 637, 653, 37 L. ed. 1207, 1211, 14 S. Ct. 225; *Harlan v. McGourin*, 218 U. S. 442, 54 L. ed. 1101, 31 St. Ct. 44, 21 Ann. Cas. 849, *supra*; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 S. Ct. 746, *supra*; *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 S. Ct. 336; *Iasigi v. Van de Carr*, 166 U. S. 391, 41 L. ed. 1045, 17 S. Ct. 595; *Hale v. Henkel*, 201 U. S. 43, 77, 50 L. ed. 652, 666, 26 S. Ct. 370; *Ex parte Wilson*, 114 U. S. 417, 421, 29 L. ed. 89, 90, 5 S. Ct. 935. The lower federal courts have generally denied petitions for the writ where the prisoner was at the time serving a part of his sentence not assailed as invalid."

Footnote # 6:

"The Courts of Appeals in circuits other than the 8th have uniformly denied petitions for writs of *habeas corpus* when the prisoner was not at that time serving the part of the sentence said to be invalid. *Carter v. Snook*, 28 F. (2d) 609 (C. C. A. 5th); *Eori v. Aderhold*, 53 F. (2d) 840, 841 (C. C. A. 5th); *De Bara v. United States*, 99 F. 942 (C. C. A. 6th); *United States v. Carpenter*, 151 F. 214 (C. C. A. 9th), 9 L. R. A. (N.S.) 1043, 10 Ann. Cas. 509; *Mabry v. Beaumont*, 290 F. 205, 206 (C. C. A. 9th); *Dodd v. Peak*, 60 App. D. C. 68, 47 F. (2d) 430, 431. And to the like effect, see *Woodward v. Bridges*, 144 Fed. 156 (D.C.); *Ex parte Davis*, 112 F. 139 (C.C.)."

CONCLUSION

It is respectfully submitted that precedent and logic substantiate the actions of the lower court in dismissing this action as premature and that therefore this appeal should be dismissed.

Respectfully submitted,

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